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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1035

THOR-WESTCLIFFE DEVELOPMENT, INC.,
Petitioner,

v.

STEWART L. UDALL, Secretary of the Interior, et al.

and

R. E. BOYLE, INTERVENOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE INTERVENOR-RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App. 17-22) is reported at 314 F. 2d 257.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1963 (Pet. App. 23). The Petition for a

Writ of Certiorari was filed on April 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior has violated Section 17 of the Mineral Leasing Act which requires the issuance of non-competitive oil and gas leases on public lands to "the person first making application who is qualified to hold a lease" by the issuance of his regulation, 43 C.F.R. 192.43 which governs the availability of such public lands for non-competitive leasing on which previous leases have expired and considers all lease offers filed within a prescribed 5 day period as simultaneously filed.

STATUTES AND REGULATIONS

Section 17(a) of the Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(a) provides:

> "All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary."

Section 17(c) of the Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(c) provides:

> "If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application, who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding."

Section 32 of the Mineral Leasing Act of 1920, 41 Stat. 450; 30 U.S.C. 189, provides:

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act * * *."

43 C.F.R. 192.43, reads in pertinent part as follows:

> "(a) * * * All lands covered by leases which expire by operation of law at the end of their primary or extended terms shall * * * be subject to filing of new lease offers only in accordance with the provisions of this section * * *.
>
> "(b) On the third Monday of each month or the first working day thereafter if the land office is not officially open for business on the third Monday, the authorized Office of the Bureau of Land Management will post on the bulletin board in each land office a list * * * of lands in leases which expired * * * and which will become subject to leasing at 10 o'clock a.m. on the fifth working day thereafter together with a notice stating that the lands in such leases are subject to simultaneous filings of lease offers from the time of such posting until 10 o'clock a.m. on the said fifth working day thereafter.
>
> * * * *
>
> "(d) If more than one offer to lease all or any part of the acreage covered by an expired, cancelled, relinquished, or terminated lease is filed during the period provided for in paragraph (b) of this section, their priorities will be determined by a public drawing in accordance with sec. 295.8 of this chapter."

STATEMENT

Effective January 7, 1960 (24 F.R. 9346), the Secretary of the Interior amended Regulation 43 C.F.R. 192.43, the validity of which is challenged by petitioner. Under subsections (a) and (b) of this regulation, lands which were embraced in oil and gas leases which had expired do not again become available for leasing until a public notice of their availability is posted on the bulletin board of the land office having jurisdiction of the lands. Offers to lease such lands which are received by 10 o'clock a.m. of the fifth working day following such posting are deemed to have been filed simultaneously. Under subsection (d) of this regulation, if more than one offer is re-

ceived during the five day period, a public drawing is held in the land office in accordance with 43 C.F.R. sec. 295.8 to determine the priority between the conflicting applicants. On July 3, 1961, petitioner filed three applications for oil and gas leases (designated NM 0196014, Wyo. 0153852 and U 071153) covering lands in New Mexico, Wyoming and Utah on which previous leases had expired on June 30, 1961. Petitioner filed these applications prior to the posting in the land offices on July 17, 1961, of notices of the availability of such lands for leasing as provided in 43 C.F.R. 192.43.

Thereafter the managers of the land offices in Santa Fe, Cheyenne and Salt Lake City rejected petitioner's applications on the grounds that they were filed prematurely and not in accordance with the Department's regulations. On appeal, the Director of the Bureau by decision dated October 26, 1961, which decision was approved by Assistant Secretary Carver on the same date, affirmed the action of the managers. Petitioner filed suit in the United States District Court for the District of Columbia requesting that this regulation be declared invalid; that the lands in question be declared to have become available for leasing on July 3, 1961, the date petitioner filed his applications, and that petitioner be declared to be the first qualified applicant. R. E. Boyle, the Intervenor, is the successful applicant for the same lands embraced in petitioner's rejected application, N.M. 0196014, and under the regulation in question lease would issue to him but for the pendency of this litigation. On cross motions for summary judgment, the District Court dismissed petitioner's action with prejudice (Jt. App. 113-114)[1] On appeal, the Court of Appeals affirmed the decision of the District Court and upheld the validity of the Secretary's regulation on the grounds that it represented an imple-

[1] Jt. App. refers to the joint appendix printed in the Court of Appeals.

mentation of the statutory language "person first making application", was not inconsistent with the language of the Act and that it was a reasonable exercise of the Secretary's authority to cope effectively with the problems encountered in his administration of the Act.

ARGUMENT

The Secretary of the Interior as the head of the Land Department "is expressly charged with the duty of enforcing the public land laws by appropriate regulations * * *." *United States* v. *Morehead*, 243 U.S. 607, 613 (1917). In *Knight* v. *U.S. Land Association*, 142 U.S. 161, 178 (1891) the Supreme Court stated in part:

> "* * * respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to claimants and to preserve the rights of the people of the United States. * * * The mode in which the supervision shall be exercised in the absence of statutory directives may be prescribed by such rules and regulations as the Secretary may adopt."

The Secretary's regulation, whose validity is challenged by petitioner, was designed to meet specific operational problems in the local land offices which were seriously impairing the administration of the Department's oil and gas program. These problems were vividly described by the affidavit of Harold R. Hochmuth, Associate Director of the Bureau of Land Management filed in the District Court (Jt. App. pp. 39-42). This affidavit stated in part the following:

> "* * * It was felt that a procedure for the filing of simultaneous offers for such lands and the utilization of the drawing procedure provided for in the departmental regulations to determine priorities was vitally necessary to correct certain problems which had developed over a long period of time in connection with oil and gas leasing. These arose as the result of the desire of all lease applicants to be first in

> line at the land offices for the purpose of gaining priority rights in oil and gas lease offers. We believed that the simultaneous filing procedure would eliminate the then existing situations in which the lease brokers were daily cluttering the various land offices to examine the records for the notations of cancelled and relinquished leases in order to file for such lands * * *. In several of the land offices as the result of these mad scrambles every morning between the different examiners of the tract books, such records became considerably damaged. Upon information and belief, there were a number of breaches of the peace in the land offices as the result of such competitive activities between the so-called land locators. The rationale for the amendment of Section 192.43 was that it would abate the situations mentioned above * * *."

This Court has long recognized that the Secretary may fashion regulations to meet new and unexpected contingencies. Thus, in *Williams* v. *United States*, 138 U.S. 514, 524 (1891), this Court stated:

> "It is obvious, it is common knowledge that in the administration of such large and varied interests as are entrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise; and therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."

Moreover, Section 32 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 189) expressly provides that "* * * the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act * * *."

Section 17(a) of the Mineral Leasing Act of 1920, as amended 74 Stat. 782, 30 U.S.C. 226(a), provides that public lands subject to disposition under the Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. Whether these lands are to be leased under the Act is discretionary with the Secretary. *United States* v. *Wilbur*, 283 U.S. 414; *Haley* v. *Seaton*, 281 F. 2d 620 (C.A.D.C.). However, having decided to lease lands which are not within a known geological structure, the Secretary is required by the Act to issue a non-competitive lease to "the person first making application, who is qualified to hold a lease under this Act."

In deciding this case the Court of Appeals rejected petitioner's assertion that the regulation is unresponsive to the statutory requirement that the lease be given to the "person first making application." The Court upheld the validity of the regulation which the Court recognized as designed "to assure public notice and fuller public participation" in the process of reissuing expired leases and "to end the mad scrambles, breaches of the peace, damage to tract books * * * as applicants compete to be the 'person first making application.'" The Court held, moreover, that the regulation was not inconsistent with the plain language of the statute; that it represented a permissable implementation of the statutory language "person first making application" and a reasonable exercise of the Secretary's authority to administer the Act.

The intervenor-respondent believes that the decisions of the courts below are correct. There is no question of Federal law in this case which warrants review by this Court, and there is no conflict here with any State law. Moreover, the decision of the court below does not conflict with any decision of this court nor with any deci-

sion of other Federal Circuit Courts. Consequently, there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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